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Supreme Court of the United States

OCTOBER TERM, 1963

No. 896

CHARLIE L. DEAN, JR., Administrator of the Estate of L. T. McGee, *Petitioner,*

versus

EDMUND Y. COLE, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

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STATEMENT

On January 27, 1961, the petitioner instituted an action in the United States District Court for the Eastern District of South Carolina, Columbia Division, to recover damages for the death of petitioner's intestate in the middle of the highway in the middle of the night on May 13, 1956, alleged to have been caused by the negligence and wantonness of the respondent in the operation of his automobile. Jurisdiction was based upon diversity of citizenship. The case was tried by the Court without a jury November 7-9, 1962, and resulted in a judgment for the petitioner (217 F. Supp. 280).

On January 7, 1964, the United States Court of Appeals for the Fourth Circuit reversed the judgment of the District Court and held that there was no substantial evidence to support the findings of the District Court with respect to negligence and contributory negligence and that the evidence established that the deceased was guilty of contributory negligence as a matter of law (326 F. 2d 967).

A petition for rehearing filed by petitioner was denied by the Court of Appeals on February 10, 1964.

Petitioner thereafter filed with this Honorable Court a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. On April 20, 1964, this Court entered its Order denying certiorari.

On June 1, 1964, after the expiration of the time prescribed in Rule 58 of the Rules of this Honorable Court for the filing of a petition for rehearing, the petitioner served upon respondent a Motion for Leave to File Petition for Rehearing of the Order denying the petition for certiorari. The ground stated by petitioner as the basis of his Motion is "that the new and controlling decision of this Court in *Mercer v. Theriot*, *supra*, 84 S. Ct. 1457, was decided subsequent to the denial of the petition for certiorari in this case and did not come to the attention of petition or his counsel until it was reported in the May 15, 1964, issue of West Publishing Company's Supreme Court Reporter, which did not reach petitioner or his counsel until May 26, 1964".

A more detailed statement of the facts of this case is contained in Respondent's Brief in Opposition to Petitioner's Petition for a Writ of Certiorari.

STATUTES AND RULES INVOLVED

This Motion involves Rule 58 of the Revised Rules of the Supreme Court of the United States, the pertinent provisions of which are set forth below:

> "*Rule 58. Rehearings.*
>
> "1. A petition for rehearing of judgments or decisions other than those denying or granting certiorari, may be filed with the clerk in term time or in vacation, within twenty-five days after judgment or decision, unless the time is shortened or enlarged by the court or a justice thereof. Such petition must briefly and distinctly state its grounds; it must be

supported by a certificate of counsel to the effect that it is presented in good faith and not for delay; . . . A petition for rehearing is not subject to oral argument, and will not be granted, except at the instance of a justice who concurred in the judgment or decision and with the concurrence of a majority of the court.

"2. *A petition for rehearing of orders on petitions for writs of certiorari may be filed with the clerk in term time or vacation, subject to the requirements respecting time*, printing, number of copies furnished, manuscript signature to certificate, and service, *as provided in paragraph 1 of this rule*. Any petition filed under this paragraph must briefly and distinctly state grounds which are confined to intervening circumstances of substantial or controlling effect (e. g., Sanitary Refrigerator Co. v. Winters, 280 U. S. 30, 34, footnote 1, 50 S.Ct. 9, 10; Massey v. United States, 291 U.S. 608, 54 S.Ct. 532), or to other substantial grounds available to petitioner although not previously presented (e. g., Schaiber-Schroth Co. v. Cleveland Trust Co., 305 U.S. 47, 50, 59 S.Ct. 8, 9). Such petition is not subject to oral argument. A petition for rehearing filed under this paragraph must be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay, and counsel must also certify that the petition is restricted to the grounds above specified.

" * * *

"4. Consecutive petitions for rehearings, and *petitions for rehearing that are out of time under this rule, will not be received.*" (Emphasis added).

QUESTION

Should the petitioner be permitted to file a petition for rehearing of the Order of this Court denying the petition for certiorari in this case after the expiration of the time prescribed therefor in Rule 58 of the Supreme Court Rules.

without the intervention of any matter pertinent to the basis upon which certiorari is sought?

ARGUMENT

I. PETITIONER'S MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING IS IN DIRECT CONFLICT WITH THE PROVISIONS OF RULE 58 OF THIS COURT.

It is apparent upon examination of petitioner's Motion for leave to file a petition for rehearing of the Order of this Court entered on April 20, 1964, denying the Petition for Writ of Certiorari, that the petitioner's Petition for rehearing is out of time under the provisions of Rule 58 of this Court and that the petitioner has failed to advance any valid reason or supply this Court with any applicable authority to support his request for such rehearing after the expiration of the time prescribed in Rule 58. On the contrary, it is respectfully submitted that an analysis of the grounds upon which petitioner relies in his Motion clearly reveals that the requested departure from the express provisions of the Rule in the instant case is unwarranted and should not be granted.

In adopting Rule 58 on July 1, 1954, this Court expressly imposed a necessary and desirable finality upon its orders denying writs of certiorari, by the inclusion of a provision, not theretofore contained in the Rules of the Supreme Court, which provides that "consecutive petitions for rehearings, and *petitions for rehearing that are out of time under this rule, will not be received*" (Rule 58 (4)). (Emphasis added). This Court has of course consistently recognized the necessity for maintaining a close guard upon the finality of litigation. In *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 63 S.Ct. 1126, 87 L.Ed. 1483 (1943), holding that the time allowed under the Federal statutes for appeal from a judgment of a State court to the Supreme Court of the United States was not extended by the period of the pendency of an unsuccessful applica-

tion to a judge of the State court for allowance of an appeal, the Court pointed out (319 U.S. 412, 415):

> "The purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose."

Similarly, in *Federal Trade Commission v. Minneapolis Regulator Company*, 344 U. S. 206, 73 S. Ct. 245, 97 L. Ed. 245 (1952), which came before the Supreme Court of the United States on a writ of certiorari to review a judgment reversing an Order of the Federal Trade Commission, the Supreme Court, in dismissing the writ as not timely, pointed out (344 U. S. 206, 213):

> "Thus, while we do not mean to encourage applications for piecemeal review by today's decision, we do mean to encourage applicants to this Court to take heed of another principle—the principle that litigation must at some definite point be brought to an end."

In the present case, petitioner's motion for leave to file an untimely petition for rehearing is based merely upon the ground that a decision of this Court, *Mercer v. Theriot*, 81 S. Ct. 1157, which petitioner erroneously contends is "controlling" and "comparable in all material respects to this case" (but see Section II hereinbelow), was decided subsequent to the denial of the Petition for a writ of certiorari in this case. Such a position in the present case is clearly in conflict with the express provision of Rule 58 and with the basic principles of finality of litigation upon which the Rule is based.

The present case is a diversity automobile accident action with its own peculiar, and relatively unusual, facts. It is only to be expected that other negligence suits will arise from time to time with some factual similarities to the present case. It is also to be expected that, for any number

of reasons under the facts and circumstances of the particular case, opposite results may well be reached in various cases even though they may bear some factual similarity to each other. Indeed, regardless of result, it is extremely difficult to find two automobile-pedestrian negligence suits which do not have *some* common feature.

It is clear, however, that the Supreme Court should not be called upon to review decisions when they have become final through the passage of the prescribed period of time, in order that those decisions may be viewed in the light of all subsequent decisions which have been decided upon their own facts, yet are alleged to be in conflict with the prior decisions concerned. If such a procedure were adopted by this Court in negligence suits, there could never be a confidest end to such suits. It would be virtually impossible to establish and define an effective standard to determine the sufficiency or insufficiency of the similarity of the facts or circumstances in the cases as they arise which could be fairly applied to determine whether each new decision of this Court requires reopening all of the hundreds or thousands of prior decisions involving somewhat similar facts.

Nor could there be a fair stopping point with respect to the passage of time. *If a case is to be in effect reopened in order to consider its alleged similarity with a case that happens to have been decided two weeks later, then logically the same policy should apply in the case of decisions handed down a month later, or a year later, or five years later, or at any time in the future*, and cases must lie in a vast and in doubt, forever, possibly to be reopened for the same reason a month later, or a year later, or five years later, or simply indefinitely.

Under such a rule there could never be a certain end to litigation. No procedure more destructive to the principle of finality of litigation can be imagined.

In the present case, after the expiration of the 25-day period allowed by Rule 58 for the filing of a petition for

rehearing, an order was entered by the District Court cancelling the judgment previously entered. Final fees were paid, thank-you letters were written, preparations were made for the withdrawal of certain exhibits from the record for return to their owners, and the case was otherwise brought to what all concerned thought was a final conclusion. All of these things must now be undone if the case is reopened.

This Court is of course fully empowered to relax the requirements of Rule 58 in instances where fairness and justice require it. It is to be noted, however, that although this Court has on occasion permitted untimely applications for rehearing or reconsideration of its orders to effect a just result in criminal proceedings, to correct errors in the Court's own mandates, or to insure the uniform application of a Federal substantive law, *examination of the decisions of this Court since the adoption of Rule 58 fails to reveal any instance in which an untimely application for rehearing has been granted in a situation comparable to the present case.*

In fact, in the case of *United States v. Ohio Power Co.*, 353 U. S. 98, 77 S. Ct. 652, 1 L. Ed. 2d 683 (1957), a tax case involving considerations different from those here involved, the dissenting opinion of Mr. Justice Harlan, with whom Mr. Justice Frankfurter and Mr. Justice Burton joined, points to the numerous occasions subsequent to the adoption of Rule 58 on which the Supreme Court has denied untimely applications for rehearing despite the claimed development of a conflict subsequent to the initial order. See *Fracey v. Studebaker Corp.*, 348 U. S. 939, 75 S. Ct. 354, 99 L. Ed. 736; *Powell v. United States*, 348 U. S. 939, 75 S. Ct. 357, 99 L. Ed. 736; *Cuckes Pub. Co. v. NLRB*, 348 U. S. 960, 75 S. Ct. 448, 99 L. Ed. 749; *Jones v. Lykes Bros. S. S. Co.*, 348 U. S. 960, 75 S. Ct. 447, 99 L. Ed. 749; *Lamprey v. United States*, 349 U. S. 969, 75 S. Ct. 879, 99 L. Ed. 1290; *Mogiakota Gas Co. v. Montana-Dakota Utilities Co.*, 349 U. S. 969, 75 S. Ct. 878,

99 L. Ed. 1290; *Zientek v. Reading Co.*, 350 U. S. 960, 76 S. Ct. 345, 100 L. Ed. 834; *Preferred Ins. Co. v. United States*, 351 U. S. 990, 76 S. Ct. 1044, 100 L. Ed. 1502; *International Molders & Foundry Union v. Western Foundry Co.*, 352 U. S. 860, 77 S. Ct. 22, 1 L. Ed. 2d 70; *Mekdeschick v. United States*, 352 U. S. 977, 77 S. Ct. 351, 1 L. Ed. 2d 330; *Consolidated Edison Co. of N. Y., Inc. v. United States*, 352 U. S. 1019, 77 S. Ct. 552, 1 L. Ed. 2d 562.

The cases of *Zap v. United States*, 330 U. S. 800, 67 S. Ct. 857, 91 L. Ed. 1259 (1947), and *Land v. Dollar*, 341 U. S. 737, 71 S. Ct. 987, 95 L. Ed. 1331 (1951), cited by petitioner in support of his motion, clearly have no application to the present situation. Both of such cases were decided prior to the adoption of the provision now included in Rule 58(4) expressly providing that untimely petitions for rehearing will not be received. Furthermore, in *Land v. Dollar*, *supra*, the Supreme Court merely continued on the docket a belated "Motion for leave to file a motion for reconsideration" of a denial of certiorari, without taking any action thereon, so that there would be no question of the Court's control over the case for "whatever action the Court may deem appropriate" (341 U. S. 737, 738). The continuance was ordered in an opinion filed with respect to related litigation in which writs of certiorari were granted, with the hearings thereon being postponed. After a second continuance, however (343 U. S. 737), the motion for leave to file a motion for reconsideration was ultimately withdrawn (344 U. S. 807, 73 S. Ct. 4, 97 L. Ed. 628). *Zap v. United States*, *supra*, was a criminal case involving considerations of fairness and justice not found in civil cases.

It is respectfully submitted that in the present case, an ordinary negligence suit for money damages, which this Court has declined to review after full consideration of the questions presented, no considerations of fairness or justice are present to justify a departure from the Court's established procedure.

II. THE DECISION IN THE CASE OF MERCER V. THERIOT CITED BY PETITIONER IS NOT APPLICABLE TO THE PRESENT CASE.

The sole ground for petitioner's Motion for leave to depart from the time requirement of Rule 38 is the subsequent rendition of this Court's decision in *Mercer v. Theriot*, 84 S. Ct. 1157, which petitioner alleges is "controlling" on this case.

We submit, however, that the *Mercer* decision does not in any way control or conflict with the decision of the Circuit Court of Appeals in this case or bear in any manner upon this Court's denial of the petitioner's original Petition for certiorari.

One of the most important features of the present case—perhaps the most important single feature—is the defense of contributory negligence interposed by the respondent. The Circuit Court of Appeals in the present case reached its decision not only upon the ground that the evidence failed to support the District Court's findings of negligence, *but also upon the independent ground that the evidence required a finding that the deceased was guilty of contributory negligence as a matter of law.* In *Mercer v. Theriot* no question of contributory negligence was considered whatsoever. There was no evidence of contributory negligence involved, and the defense of contributory negligence was not argued on appeal or discussed by the Court.

It is clear, therefore, that the case of *Mercer v. Theriot* cannot be considered "controlling" or as "comparable in all material respects to the case at bar", as respondent asserts in his Motion for an untimely hearing.

Furthermore, it is clear that the case of *Mercer v. Theriot* has no application whatsoever to the question of whether this Court should grant certiorari in the instant case. This Court does not, of course, grant certiorari except where there are "special and important" reasons therefor as set out in Rule 19 of the Rules of this Court. It is apparent from the decision in *Mercer v. Theriot* that cer-

tiorari was granted in that case because it appeared that the question was presented whether a *State* or *Federal* standard determines the sufficiency of the evidence to support a jury verdict in cases in the District Courts where jurisdiction is based on diversity of citizenship. *There is clearly no semblance of such a question in the instant case.* No conflict in State and Federal standards with respect to the sufficiency of the evidence has been shown or even alleged in this case. The Court of Appeals in the instant case merely applied the ordinary and customary rules relating to the review of findings of the trial judge in non-jury cases pursuant to Rule 52(a) of the Federal Rules of Civil Procedure and found that there was no substantial evidence to support the findings of the District Court with respect to negligence and contributory negligence. *The decision of the Court of Appeals is clearly in accord with applicable State and Federal decisions.* See e.g. *Carina v. Swindler*, 228 S. C. 550, 91 S. E. 2d 254 (1956); *Hopkins v. Reynolds*, S. C. , 135 S. E. 2d 75 (1964); *Wright v. South Carolina Power Co.*, 205 S. C. 327, 31 S. E. 2d 904 (1944); *Attaway v. One Chevrolet 5-Ton Truck*, 228 S. C. 559, 91 S. E. 2d 270 (1956); *Smith v. Biggis*, 223 F. 2d 839 (CCA 4, 1955), cert. denied, 351 U. S. 912, 76 S. Ct. 701, 100 L. Ed. 1446; *Miller v. East Georgia Motors, Inc.*, 303 F. 2d 488 (CCA 4, 1962); *Thompson v. Washington*, 206 F. 2d 147 (CCA 4, 1947).

This Court has considered fully the reasons advanced by petitioner for the Court to exercise its discretion to grant a writ of certiorari, and has declined to grant the writ. The subsequent decision of this Court in *Mercer v. Theriot* clearly does not add support to any of the reasons asserted by petitioner initially or supply any additional grounds upon which the Court should now, belatedly, exercise its discretion. No "special and important" reasons for the granting of a review on writ of certiorari within the provisions of Rule 19 applicable to the instant case are created or supported by the decision in *Mercer v.*

Theriot. There is no substantial Federal question involved as a result of that decision. No conflict is created between decisions of the circuit courts on a similar matter. No important State question applicable to this case is involved, nor any conflict of a circuit court with applicable State law. No departure from the accepted and usual course of judicial proceedings is involved.

It is therefore submitted that the subsequent decision of *Mercer v. Theriot* clearly should not be considered a valid reason for this Court to permit the petitioner to escape the requirements of Rule 38.

In the final analysis, it is apparent that the petitioner is asking this Court to permit a departure from its Rules merely because of a decision rendered subsequent to the denial of certiorari in this case which the petitioner finds to have minor similarities in some of the facts and which finally resulted in a judgment in favor of the plaintiff rather than the defendant. Ignoring the basic dissimilarity of the decision in *Mercer v. Theriot* from the aspects of the instant case pertinent here, and the purpose for which this Court granted certiorari in *Mercer v. Theriot* in the first instance, the petitioner asks this Court to parallel the evidence in the two cases and reconsider its decision to deny certiorari in this case, *not* because of any special or important matter which requires consideration by this Court, but simply to review the evidence in the present case in the light of the evidence in the *Mercer* case. Having (properly) been refused entrance to this Court through the front door, the petitioner is now trying to slip in through the side door to persuade this Court to review the evidence a third time. As previously discussed in respondent's Brief in Opposition to Petitioner's Petition for a Writ of Certiorari, however, it is not the policy of this Court to grant certiorari merely to review the evidence or to give the defeated party in the Circuit Court of Appeals another hearing. *Houston Oil Co. v. Goodrich*, 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385 (1918); *Magnum*

Import Co. v. Cotg, 362 U. S. 159, 43 S. Ct. 531, 67 L. Ed. 922 (1922); *Rudolph v. United States*, 370 U. S. 269, 82 S. Ct. 1277, 8 L. Ed. 2d 484 (1962).

After full consideration of the matter, this Court has denied certiorari in this case and no petition for rehearing has been filed within the time prescribed by the Rules. We respectfully submit that the petitioner clearly should not be permitted to file a petition for rehearing after the expiration of the prescribed time in reliance upon a subsequent decision in a case reviewed by this Court on a different question and involving different evidence. We submit that the grounds upon which the Motion for leave to file an untimely petition for hearing is submitted are without merit and the petitioner's Motion should be denied.

CONCLUSION

We respectfully submit that the policy of this Court to protect the right of litigants to consider their case at an end at some definite point of time and to insure adherence to the principle of finality of litigation should be applied in this case and the Rules of this Court enforced. The position advanced by the petitioner for leave to file an untimely petition for rehearing in this case is clearly impracticable and is not supported by any reasons of fairness or justice for which this Court should be moved to relax the express requirements of Rule 58.

For the reasons and upon the authorities discussed hereinabove, we submit that the petitioner's Motion to file a petition for rehearing of this Court's Order denying certiorari in this case is clearly without merit, and we respectfully ask that it be denied.

Respectfully submitted,

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